FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WADE B. COOK, an individual,
Plaintiff-Appellant-
Cross-Appellee,

v.

ANTHONY ROBBINS, an individual;

ROBBINS RESEARCH INTERNATIONAL,

INC., a Nevada corporation; and

CHARLES MELLON, an individual,
Defendants-Appellees-
Cross-Appellants.

Nos. 98-36242

99-35141

D.C. No.

CV 97-1008 JET

OPINION

Appeal from the United States District Court
for the Western District of Washington
Jack E. Tanner, District Judge, Presiding

Argued and Submitted
August 8, 2000--Seattle, Washington

Filed November 16, 2000

Before: Betty B. Fletcher and A. Wallace Tashima,
Circuit Judges, and Adrian G. Duplantier, District Judge.*

Opinion by Judge Tashima

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*The Honorable Adrian G. Duplantier, Senior United States District
Judge for the Eastern District of Louisiana, sitting by designation.

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COUNSEL

H. Troy Romero, Bellevue, Washington, for the plaintiff-appellant and cross-appellee.

Peter S. Selvin, Los Angeles, California, for the defendants-appellees and cross-appellants.

OPINION

TASHIMA, Circuit Judge:

Wade B. Cook filed this copyright infringement action alleging that Anthony Robbins and Robbins Research International, Inc. ("RRI") (collectively "Defendants") used Cook's expressions from his book Wall Street Money Machine in their Financial Power seminar and manual. Cook appeals the district court's grant of judgment as a matter of law ("JMOL") in favor of Defendants, following a jury verdict awarding Cook $655,900. The district court found that Cook failed to prove that any of RRI's profits were attributable to phrases from his book. Defendants cross-appeal, claiming that JMOL should also have been granted in their favor because: (1) the material was not protectable through copyright; and (2) the use constituted a fair use.**1** We have jurisdiction under 28

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1 Defendants also purport to appeal from the pretrial order denying their motion for summary judgment on the ground that any use of the copyrighted material was a fair use. However, "the denial of a motion for summary judgment is not reviewable on an appeal from a final judgment entered after a full trial on the merits." Price v. Kramer, 200 F.3d 1237, 1243 (9th Cir. 2000) (internal quotation marks and citations omitted). On this issue, therefore, we review only the district court's denial of the Rule 50(b) motion, on the record that was made at trial. See id.

U.S.C. § 1291, and we reverse the district court's grant of JMOL in favor of Defendants and remand for reinstatement of the judgment in favor of Cook.

I. BACKGROUND

Cook, along with the company that bears his name, produces seminars. In late 1995, Cook wrote a best-selling book, Wall Street Money Machine. In the book, Cook uses his experiences as a former taxi cab driver to advocate strategies for stock and stock option transactions. The book highlights an investment theme called "meter drop." As a taxi driver, Cook learned that he could make more money taking numerous short trips than by waiting for higher fares. In Wall Street Money Machine, Cook applies this concept to stock trading techniques. The book also discusses Cook's "rolling stock" concept. A "rolling stock" is stock that tends to consistently roll up to a specific price point and then drop down to a specific price point in an obvious pattern of repeated waves.

On May 21, 1997, Cook obtained a copyright registration for Wall Street Money Machine. The book spent 18 months on the New York Times business bestseller list. It also appeared on numerous other business bestseller lists, including the USA Today list. Nearly one million copies of the book have been sold.

Robbins is the chairman of RRI, which has produced seminars for 18 years. RRI seminars incorporate presentations and game playing as an interactive method of learning. Manuals are provided to seminar attendees. Robbins has taught financial seminars since 1989 and has discussed momentum investing since 1996, when the stock market became more volatile. Since 1989, Robbins has been teaching the "ring toss" concept. Seminar attendees actually play a ring toss game, designed to teach that large returns may be gained cumulatively from making small returns.

Robbins read Wall Street Money Machine in April 1996. He thought the book was "well written in terms of its simplification" of momentum trading. He had never used the terms "meter drop" or "rolling stock" before reading Cook's book. Soon after reading the book, Robbins attended a portion of Cook's seminar, Wall Street Workshop. Robbins then met with Cook and proposed a joint venture, but the negotiations crumbled in June 1996.

Nonetheless, RRI revised its financial seminar to create Financial Power, which was first presented in August 1996. Financial Power expanded on RRI's previous seminars. Pamela Hendrickson, a member of RRI's creative department, helped to compile the Financial Power seminar. Attendees of the three or four day seminar received a manual, which was presented in a three-ring binder. The manual contains approximately 52,000 words and is 308 to 355 pages long, in different versions. The seminars do not precisely follow the format of the manual.

Robbins promoted Cook's book at RRI's seminars. Two expressions from Wall Street Money Machine,"meter drop" and "rolling stock," were discussed in the first version of the Financial Power seminar manual. Robbins claimed that he had heard the term "meter drop" from New York taxi drivers. The manual referenced the "meter drop" theme nine different times. "Rolling stock" appeared twice in the first version of the Financial Power manual.

Due to legal concerns,**2** Hendrickson instructed her staff to remove all of the "rolling stock" and "meter drop" references, but "meter drop" still appeared six times in subsequent editions, allegedly due to a word processing error. Both of the "rolling stock" references were removed.

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2 Robbins believes that the language was removed from the Financial Power manuals because Cook was threatening legal action.

Cook filed this suit for infringement of his copyright of Wall Street Money Machine, based on eleven different statements in the Financial Power manual. The district court granted summary judgment on seven passages alleged to be infringing, ruling that they were not protectable by copyright because they "explain basic rules of stock market movement." It found, however, that there were genuine issues of fact about the protectability of the remaining four passages:

> Questions of fact remain, however, on whether plaintiff can meet the "intrinsic" or subjective test, which asks the reasonable observer to consider whether the "total concept and feel of the works " is

substantially similar. Narell v. Freeman, 872 F.2d 907, 913 (9th Cir. 1989). Where the copied protected portions are only a small part of the larger work, as is the case here, that material must be qualitatively important to either plaintiff's or defendant's work. Id. A reasonable jury could find that the four passages are qualitatively important. Summary judgment is thus not appropriate.

After the summary judgment ruling, the following four statements remained at issue:

Cook's Wall Street Money Machine.Workbook	**RRI's Financial Power**
Money is made on the Meter Drop.	The ring toss/meter drop. The most money is made on the _______.**[3]**
No one I know has come up with a name for the type of investing I call "Rolling Stocks." It works on stocks that roll up and down in repeated waves. . . . Some roll fast and some slow.	A rolling stock is a stock that tends to consistently roll up to a specific price point and then drop down to a specific price point in an obvious pattern (repeated waves). Some of these companies roll fast (4-6 weeks) and some roll slow (8-10 weeks).
Rule #1: You have to know your exit before ever going in.	Rule #1: You have to know your _______ before going in.
Rule #2: Don't get greedy.	Rule #2: Don't get _______!

3 According to Robbins, RRI intentionally left blanks so that attendees would actively participate and "to make sure they don't blankly stare at the pages."

The case was then tried to a jury.**4** An accountant testified for each party. Gary M. Burns testified for Cook that RRI's total gross revenue for the Financial Power seminars was approximately $3.7 million. Burns also estimated that RRI's profits from Financial Power were $700,000 to $1 million. John M. Crutcher, testifying for Defendants, estimated that RRI had earned $673,000 from the Financial Power seminars. Crutcher also testified he had no way of knowing whether these profits were linked to the infringing expressions.

The jury returned a special verdict in favor of Cook, finding that Cook had a valid copyright and that there was infringement on two of the four phrases: "Money is made on the Meter Drop" and "No one I know has come up with a name for the type of investing I call `Rolling Stocks.' It works on stock that roll up and down in repeated waves. . . . Some roll fast and some slow." It also found that Defendants' use was not a fair use. It awarded Cook infringer's profits of $655,900, and the court entered judgment on the verdict.

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4 The pretrial rulings were made by Judge Coughenour, after which the case was reassigned to Judge Tanner for trial.

Defendants' timely moved for JMOL under Federal Rule of Civil Procedure 50(b) on three grounds: (1) Lack of proof of damages; (2) That any use was a fair use; and (3) That the damages were excessive. The district court granted the motion, vacated the judgment, and entered judgment for Defendants. In doing so, it found that Cook did not prove profits attributable to infringement because he presented no evidence showing a causal connection between the infringing words and the infringer's profits. The court denied Defendants' alternative motions for remittitur and/or a new trial. Cook timely appealed from the JMOL order and Defendants cross-appealed from the denial of that part of their motion for JMOL based on fair use, as well as from the denial of their motion for a new trial.

II. STANDARD OF REVIEW

We review de novo the district court's decision to grant JMOL under Rule 50(b). See Headwaters Forest Defense v. County of Humboldt, 211 F.3d 1121, 1132 (9th Cir. 2000). "Judgment as a matter of law is appropriate when the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, which is contrary to the jury's verdict." Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157, 1161 (9th Cir. 1997), cert. denied, 525 U.S. 812 (1998).

Moreover, a verdict must be supported by "substantial evidence," which we have defined, in this context, as such relevant evidence as reasonable minds might accept as adequate to support a conclusion. See Poppell v. City of San Diego, 149 F.3d 951, 962 (9th Cir. 1998). Additionally, this court will not overturn a district court's denial of a motion for a new trial absent an abuse of discretion. See Scott v. Ross , 140 F.3d 1275, 1281 (9th Cir. 1998), cert. denied, 526 U.S. 1033 (1999).

III. DISCUSSION

1. Profits - Rule 50(b) Ruling

In ruling on the Rule 50(b) motion, the district court held that Cook presented no evidence at trial that Defendants' profits were attributable to the infringing words. It reasoned that 17 U.S.C. § 504(b) establishes a threshold burden for a copyright owner to prove a causal link between the infringer's profits and the infringement, and that Cook failed to establish such a causal link. The district court, however, misread the statute, which provides:

> The copyright owner is entitled to recover . . . any profits of the infringer that are attributable to the infringement and are not taken into account in computing actual damages. In establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross revenue, and the infringer is required to prove his or her deductible expenses and the elements of profit attributable to factors other than the copyrighted work.

17 U.S.C. § 504(b) (emphasis added). The district court erred because, in its order granting Defendants' Rule 50(b) motion, it misquoted § 504(b) by omitting the portion emphasized above.**5** By omitting key language from the statute, the district court became confused in its reasoning. It held that"there must be profits attributable to the infringement before plaintiffs are entitled to merely show gross receipts and shift the burden to defendants to apportion profits to the infringement." The district court's reasoning, of course, is exactly the oppo-

site of the statute's plain wording and thus erroneous.

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5 According to the district court's erroneous quotation of the statute, § 504(b) provides that "[i]n establishing the infringer's profits, the copyright owner is required to present proof only of the infringer's gross expenses and the elements of profit attributable to factors other than the copyrighted work."

According to the statutory scheme:

> the plaintiff must meet only a minimal burden of proof in order to trigger a rebuttable presumption that the defendant's revenues are entirely attributable to the infringement; the burden then shifts to the defendant to demonstrate what portion of its revenues represent profits, and what portion of its profits are not traceable to the infringement.

Data Gen. Corp. v. Grumman Sys. Support Corp. , 36 F.3d 1147, 1173 (1st Cir. 1994) (citing Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 514 (9th Cir. 1985) (Frank Music I)). The report of the House Judiciary Committee clarifies the burdens:

> [W]here some of the defendant's profits result from infringement and other profits are caused by different factors, it will be necessary for the court to make an apportionment. However, the burden of proof is on the defendant in these cases; in establishing profits the plaintiff need prove only "the infringer's gross revenues," and the defendant must prove not only "his or her deductible expenses" but also"the element of profit attributable to factors other than the copyrighted work."

H.R. Rep. No. 94-1476, at 161 (1976).

The statutory burden is clear; Defendants had to prove the percentage of their gross revenue not attributable to Cook's book. See Three Boys Music Corp. v. Bolton, 212 F.3d 477, 487 (9th Cir. 2000) (holding that "the statutory burden of proof lies with Sony Music to prove what percentage of their profits were not attributable to copying the Isley Brothers' `Love is a Wonderful Thing' "); Frank Music I, 772 F.2d at 518 ("The burden of proving apportionment, (i.e., the contribution to profits of elements other than the infringed prop-

erty), is the defendant's."). Further, we have clarified that "[i]n performing the apportionment, the benefit of the doubt must always be given to the plaintiff, not the defendant." Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 886 F.2d 1545, 1549 (9th Cir. 1989) (Frank Music II); Frank Music I, 772 F.2d at 514 ("Any doubt as to the computation of costs or profits is to be resolved in favor of the plaintiff."). "If the infringing defendant does not meet its burden of proving costs, the gross figure stands as the defendant's profits." Id.

Substantial evidence supports the jury's finding, and the evidence does not compel a contrary conclusion. Burns, Cook's expert, estimated that the gross revenue from the infringing seminars and products associated with them was over $3.7 million. Burns also estimated that RRI's Financial Power profits were $700,000 to $1 million. Crutcher estimated that RRI had earned $673,000 from the Financial Power seminars. Crutcher also testified that RRI did not keep records that allowed it accurately to predict costs or overhead. When asked if he had any reason to believe that the profit from the Financial Power seminars was linked to the infringing phrases, Crutcher answered, "I have no way of knowing whether or not they do."

Defendants argue that they presented"uncontroverted" evidence "that [RRI] derived none of its seminar-related profits from the four allegedly infringing phrases." Defendants point to the testimony of Robbins and Hendrickson, who made statements such as, "there's no income coming from these four words ["meter drop" and "rolling stock"]." These self-serving statements do not satisfy Defendants' burden of proving deductible expenses or elements of profit attributable to factors other than the copyrighted work. Neither witness explained how that conclusion was reached; neither had any accounting expertise. The jury, moreover, did not have to believe Robbins or Hendrickson. These statements do not serve as a proper basis for granting Defendants' Rule 50(b)

motion; they certainly do not compel a conclusion contrary to the jury's finding.**6**

Defendants further claim that, in complex cases where the stream of revenue is difficult to ascertain, § 504(b) creates a threshold burden for copyright owners to prove causation in order to obtain an infringer's profits. Such a burden is contrary to law and, in most cases, would effectively negate the burden-shifting required by the statute.

Defendants are correct in noting that causation is an element of § 504(b). They are mistaken, however, in the assumption that causation need be proved by the copyright holder. On the contrary, Defendants carry this burden. Indeed, "[t]he defendant's burden under the apportionment provision of Section 504(b) is primarily to demonstrate the absence of a causal link between the infringement and all or part of the profits claimed by the plaintiff. . . . [T]he rebuttable presumption of causation represents a presumption as to both cause-in-fact and proximate cause . . . ." Data Gen., 36 F.3d at 1175.

Defendants cite various cases which purportedly support their argument. They rely, for example, on Walker v. Forbes, Inc., 28 F.3d 409, 412 (4th Cir. 1994), in which the Fourth Circuit noted that § 504(b)'s requirement that profits be attributable to the infringement "is a rule of causation . . . ."

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6 Defendants argue that "an appellate court cannot consider issues of witness credibility" when assessing a grant of a Rule 50(b) motion. This court has stated that "[t]he test for the appropriate grant of a [JMOL] is whether, without the need for weighing the credibility of witnesses, the evidence and its inferences, considered as a whole and viewed in the light most favorable to the party against whom such motion is granted, can support only one reasonable conclusion, i.e., that the moving party is entitled to judgment notwithstanding the adverse verdict. " Davison v. Pacific Inland Navigation Co., 569 F.2d 507, 509 (9th Cir. 1978) (emphasis added). Simply because this court should not embark on an independent review of witness credibility does not negate our duty to consider the witnesses' testimony in the light most favorable to Cook.

Walker, however, does not stand for the proposition that this burden of causation is to be borne by the copyright owner. Quite the contrary, in Walker, the court held that the defendant had successfully sustained its burden of proving there was no causal link between the majority of its profits from the sale of Forbes magazine and an infringing photograph of a businessman in the Forbes 400 issue. See id. at 412-14. Accordingly, the court upheld the jury's minimal award of damages.

Defendants also rely on Frank Music II, 886 F.2d at 1553, and Rainey v. Wayne State Univ., 26 F. Supp. 2d 963 (E.D. Mich. 1998), for the proposition that a copyright owner carries the burden of establishing causation as a threshold element. Both Frank Music II and Rainey, however, to the extent they discuss causation, deal only with the indirect profits doctrine.[7] In this case, the only profits at issue are those that flow directly from the infringing seminar and manual. Such profits fall squarely within Frank Music II's description of "direct profits." In Frank Music II, we held that defendant MGM's use of segments from the movie Kismet in its hotel/casino production, Hallelujah Hollywood infringed upon plaintiff's copyright. Frank Music II, 886 F.2d at 1548."Direct profits" included all profits directly obtained from the production. The "indirect profits" discussion involved the

> relative contributions of Hallelujah Hollywood . . . to the hotel's profits, including the hotel's guest accommodations, restaurants, cocktail lounges, star entertainment in the "Celebrity" room, the movie theater, Jai Alai, the casino itself, convention and banquet facilities, tennis courts, swimming pools, gym and sauna, and also the role of advertising and general

7 In Frank Music II, we left open the possibility that causation may be a threshold requirement under § 504(b) for copyright owners attempting to obtain indirect profits. Frank Music II, 886 F.2d at 1553. As explained above, however, this question is not before us.

> promotional activities in bringing customers to the hotel.

Id. at 1550. "Direct profits," therefore, are those flowing directly from the infringing work or production, in this case the seminar and the manual, not the infringing portion of the work. See id. Unlike in Frank Music II , Cook does not seek any of RRI's indirect profits; therefore, Frank Music II and Rainey do not apply.

It was therefore Defendants' burden to show lack of causation, once Cook established profits. Although Defendants contend that they presented evidence that met their burden, this does not mean that the evidence, construed in the light most favorable to Cook, permits only the conclusion that none of the profits were attributable to the infringement. See

Omega Envtl., 127 F.3d at 1161. The district court thus erred in setting the verdict aside.

2. Copyrightable Material

Defendants also argue that "Cook did not establish copying of any protected elements of his work. The two phrases -- `meter drop' and `rolling stock' -- are not protected."

"Copyright law protects only an author's expression. Facts and ideas within a work are not protected. " Narell v. Freeman, 872 F.2d 907, 910 (9th Cir. 1989) (citing Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 547-48 (1985)). "Phrases and expressions conveying an idea typically expressed in a limited number of stereotyped fashions are not subject to copyright protection." Id. at 911 (citations omitted). Indeed, to be entitled to copyright protection, a work must possess at least some minimal level of creativity. See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991). The Supreme Court explained that for a work to be "original," "the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works

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make the grade quite easily, as they possess some creative spark. no matter how crude, humble or obvious it might be." Id. (internal quotation marks and citation omitted). See also Urantia Found. v. Maaherra, 114 F.3d 955, 959 (9th Cir. 1997).

Robbins testified that he used Cook's unique phrases because of their creativity. When asked about the"rolling" term, Robbins explained that "I like `rolling stock.' It's a nice phrase [Cook] coined to describe something that already existed." Robbins testified that he had never used the term "rolling stock" in his financial seminars before reading Wall Street Money Machine. Previously, Robbins had used the term channeling to describe the concept, but he explained that "I liked the idea of rolling stock. It's a better picture. Channeling sounds like some spiritual call 1-900 number." Similarly, Robbins testified that he had not used the term"meter drop" before reading Cook's book.

Cook's complete expressions in conveying the meaning of "meter drop" and "rolling stock" are creative, even if only minimally so, and are protected by his copyright in Wall

Street Money Machine. See Feist Publ'ns, 499 U.S. at 345. Viewing the evidence in the light most favorable to Cook does not compel a contrary finding that the infringing expressions were not copyrightable material.[8]

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8 Defendants also argue that because new financial terms such as "day trading" have become "commonly-used expressions" and would not be entitled to copyright protection, Cook should likewise be denied protection. Narell, 872 F.2d at 911; see Kouf v. Walt Disney Pictures & Television, 16 F.3d 1042, 1045 (9th Cir. 1994) (holding that general plot themes are not protected by copyright); See v. Durang , 711 F.2d 141, 143 (9th Cir. 1983) (finding unprotected "stock scenes or scenes that flow[ ] necessarily from common unprotectable ideas"). Cook's entire expressions are not "ordinary terms" used in the financial world, Narell, 872 F.2d at 911; they are used narrowly in context and have creative elements.

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3. Fair Use

Defendants also contend that the district court erred in failing to grant their JMOL motion on the ground that their use was a fair use. "The fair use doctrine confers a privilege on people other than the copyright owner to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner. " Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1151 (9th Cir. 1986) (internal quotation marks and citations omitted). Fair use is a mixed question of fact and law. See id. at 1150-51 (citations omitted).

17 U.S.C. § 107 provides four factors for courts to consider:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107. See also Harper & Row, 471 U.S. at 560-61. The statute specifies that fair use includes copying"for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or

research." 17 U.S.C. § 107.

Under the first factor, Defendants argue that the Financial Power seminar is "not solely or even mostly commercial in nature. Although the seminar is a for-profit endeavor, its primary purpose is educational." Participants in the Financial Power seminar each paid around $3,000 to attend. Robbins has made his fortune providing these "educational " seminars. Thus, the seminars and manual have an undeniable commer-

cial purpose. Although "[t]he commercial nature of a use is a matter of degree," Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1262 (2d Cir. 1986), we have held that "commercial use of copyrighted material is presumptively unfair, " Narell, 872 F.2d at 913. While there may be some educational benefits, viewing the evidence in the light most favorable to Cook, a reasonable jury could certainly have concluded that the seminars are not "primarily for public benefit [but] for private commercial gain." Hustler, 769 F.2d at 1153.

Second, examining the "nature of the work," both Wall Street Money Machine and the Financial Power seminar manual are nonfiction. See Harper & Row, 471 U.S. at 563 (acknowledging that "[t]he law generally recognizes a greater need to disseminate factual works than works of fiction or fantasy") (internal quotation marks and citations omitted). Although this factor may weigh in Defendants' favor, it is not dispositive.

Turning to the third factor, it is necessary to examine "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C.§ 107. The Supreme Court has instructed that courts should examine how "the extent of permissible copying varies with the purpose and character of the use." Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 586-87 (1994). Defendants argue that the "meter drop" and "rolling stock" expressions were only a "minuscule portion" of Wall Street Money Machine. Even if Defendants are right that the quantity was small, a reasonable jury could still find that the passages were substantially important. Cook testified that the phrases were an"important part of my book" and an "important part of my life." Cook also testified that the "meter drop" theory is"the very essence of what I teach." Viewing the evidence in the light most favorable to Cook, a reasonable jury certainly could have concluded that the phrases were a qualitatively substantial part of his work.

Finally, the fourth factor, the effect of the use on the potential market for or value of the copyrighted work, is "undoubtedly the single most important element of fair use." Harper & Row, 471 U.S. at 566. The jury certainly could have found that Wall Street Money Machine and the Financial Power seminar served similar markets. Those seeking financial advice from Wall Street Money Machine might very well be the same people who would attend the Financial Power seminar and receive the manual. That the Financial Power manual is not sold separately, but is only distributed to seminar attendees, does not alter the analysis. It also does not matter that Cook's book was still successful after Defendants used his expressions; perhaps Cook's sales would have been even better, absent any infringement. Viewing the evidence of the market in the light most favorable to Cook, it is reasonabale to conclude that the markets were similar, if not the same.

Viewed in the light most favorable to Cook, the evidence does not compel a finding contrary to the jury's finding that Defendants' use was not a fair use.

4. New Trial/Remittitur

Defendants alternatively argue they should be granted a new trial under Federal Rule of Civil Procedure 50(c)(1), or a remittitur, because the verdict was against the clear weight of the evidence, the damages were excessive, and an injustice was done. The district court denied the motion, stating that "because there were no relevant witnesses excluded, no relevant evidence excluded, no alleged errors in the jury instructions, and an injustice was not done, a new trial is not warranted."

Defendants argue that the district court did not reach the question of whether a new trial was required because the verdict was against the clear weight of the evidence, and that this court could make that determination. See Acosta v. City and

County of San Francisco, 83 F.3d 1143, 1149 (9th Cir. 1996). The jury specifically found that the profits were attributable to the infringement. Indeed, Defendants presented no evidence, aside from Defendants' own self-serving statements and simple word-counting, that delineate which profits were not attributable to the infringement. Moreover, the verdict was less than the total seminar profits and was not excessive; the clear weight of the evidence does not compel a new trial; and an injustice was not done. There was no abuse of discretion in the denial of the motion for a new trial.

Defendants argue in the alternative that if this court reverses the judgment of the district court, it could grant remittitur and reduce the award to Cook. "Where there is no evidence that passion and prejudice affected the liability finding, remittitur is an appropriate method of reducing an excessive verdict[.] `The prevailing party is given the option of either submitting to a new trial or of accepting a reduced amount of damage which the court considers justified.' " See Seymour v. Summa Vista Cinema, Inc., 809 F.2d 1385, 1387 (9th Cir. 1987) (quoting Fenner, 716 F.2d at 603). The verdict, however, is supported by the evidence and is not excessive; thus, the district court did not abuse its discretion in denying Defendant's alternative motion for a remittitur.

IV. CONCLUSION

The evidence, viewed in the light most favorable to Cook, does not compel a conclusion contrary to the jury's award of profits. The verdict was supported by substantial evidence. The district court therefore erred and its grant of JMOL is reversed and the case is remanded with instructions to reinstate the judgment on the verdict in plaintiff's favor in the sum of $655,000.00.

REVERSED and REMANDED.